

Appeal from a decision of the Grants Pass Resource Area Manager, Bureau of Land Management, providing notice of the institution of formal trespass proceedings and requiring the removal of unauthorized property located on Federal land. OR-45389.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Mining Claims: Recordation of Certificate or Notice of Location

Under 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file a copy of the official record of the notice or certificate of location with BLM on or before Oct. 22, 1979, and failure to do so constituted an abandonment of the claim by the owner.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Mining Claims: Recordation of Certificate or Notice of Location--Trespass: Generally

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

APPEARANCES: Mr. and Mrs. Michael Bosch, Cave Junction, Oregon, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Mr. and Mrs. Michael Bosch have appealed from an October 10, 1989, decision of the Grants Pass Resource Area Manager, Bureau of Land Management (BLM), providing notice that formal trespass proceedings had been instituted against them and requiring, within 30 days of receipt of the

decision, the removal of unauthorized property, including a cabin and outbuildings, located on public land under the jurisdiction of BLM described as lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon. 1/

On August 15, 1985, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988), BLM issued Life Estate Residential Occupancy Lease OR 39060 to Elberta L. Bosch, appellant Michael Bosch's mother. The lease authorized Elberta L. Bosch to maintain and use a residential structure and five outbuildings located in lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon, and expressly limited the term of the lease to a period not to exceed her life, subject to earlier relinquishment, abandonment, termination, or modification.

In a July 22, 1985, land report prepared to determine if the lease should be issued, BLM provided the following background information:

Although Mr. Harry C. Bosch claimed to have lived on his mining claim in Lot 7, section 23, T. 40 S., R. 8 W., since 1939, an official trespass case (5-867) was not opened until 1982, when he attempted to file a notice to mine in the W 1/2 of the W 1/2 of section 23. It was discovered that no claims existed at all in section 23. Mr. Bosch supposedly has always had a claim in Lot 7 but evidently did not file it with the BLM as required under F.L.P.M.A. [2/] Mr. Bosch was going by an old mining book put out in 1931 which did not mention the need to file.

Mr. Bosch passed away during the winter of 1985 and is survived by his wife, Elberta, who still lives on the claim, and by a son who currently lives in Cave Junction, Oregon.

In 1984, the Medford District developed its policy regarding unauthorized use. It was decided that if substantial improvements existed, a residential occupancy lease would be one alternative in resolving the trespass. [Emphasis in original.]

By letter dated June 30, 1989, BLM informed Elberta L. Bosch that it had learned that she no longer lived at the cabin located on public lands

1/ The case record contains no information regarding the "formal trespass proceedings," such as the date of their initiation or the forum in which they were initiated.

2/ Although not discussed in the land report, on June 1, 1982, Harry C. Bosch, Sr., filed for recordation with BLM a notice of location for the "Hard Work" placer mining claim, stating that he located the claim on May 21, 1982, in lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon. BLM accepted that notice for recordation purposes and assigned the claim recordation number ORMC 51826. The significance of this location will be discussed infra.

and that her son and his family were now residing there. BLM requested that she notify BLM if she intended to reside on the leased public lands, noting that the lease would be terminated and all improvements required to be removed if she did not intend to live there.

Elberta L. Bosch responded by letter dated July 10, 1989, stating that she was no longer living on the lease "as I have moved to Washington and do not intend to move back to Oregon."

On July 19, 1989, BLM notified Elberta L. Bosch that since she had relinquished her right to occupy the lands described in her lease, all improvements had to be removed from the land and the unauthorized occupancy terminated within 30 days. The notice was also personally delivered to Michael Bosch, the son who was living on the land with his family. BLM stated that if the structures were not timely removed, they would become the property of the United States.

By letter dated August 2, 1989, appellants advised BLM that they did not recognize BLM's right to evict them from their home, deprive them of their livelihood, or seize and control their improvements. They requested a 30-day extension to enable them to obtain legal counsel. BLM granted the extension. 3/

On September 28, 1989, several BLM officials met with Michael Bosch at the residence on the lease to discuss the trespass and to determine whether counsel had been retained. Because appellants had not yet contacted legal counsel, BLM agreed to give them an additional 30 days to obtain legal advice.

On October 10, 1989, the Grants Pass Resource Area Manager issued his decision advising appellants that BLM had instituted formal trespass proceedings pursuant to 43 CFR 2920.1-2 and FLPMA. He notified them that they were required to remove the unauthorized property, including their cabin, outbuildings, and personal property located in the cabin and outbuildings, within 30 days of receipt of the decision, or BLM would take possession of the property and destroy or remove it at appellants' expense. 4/ He also informed them that failure to timely remove the property and resolve their trespass liability could result in a fine or imprisonment under 43 CFR 9262.1.

On appeal, appellants assert that their cabin is located on the Hard Work mining claim (ORMC 51826), which was located in 1939 by Harry C.

3/ In a letter dated Sept. 13, 1989, BLM informed Elberta L. Bosch that the lease had been terminated and the case file closed. BLM also told her that appellants had been notified that they had to vacate the land since they had no right to occupy the site, and that the additional time they had requested would be allowed.

4/ We note that BLM issued its decision requiring removal of the improvements prior to the running of the 30-day period it had allowed on Sept. 28, 1989, for appellants to obtain legal counsel.

Bosch, Sr., Michael Bosch's father, who lived there with his family until 1941. They contend that in 1957, the family returned to Oregon, bought back title to the Hard Work claim, and located eight additional claims, the Dakota Boys #1-8 (ORMC 51827-34), in the name of Harry C. Bosch, Jr., Michael Bosch's brother. Appellants maintain that Harry C. Bosch, Jr., has performed the required assessment work and filed the required notices each year. They argue that they have lived on the claim continuously since 1957 and have paid taxes on the improvements on the land since that time. Appellants also dispute BLM's statement in the July 22, 1985, land report that no claims exist in sec. 23, and contend that records of the claim can be found on microfilm in the Medford District Office and in the Oregon State Office in Portland.

[1] Under section 314 of FLPMA, 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before October 21, 1976, was required to file a copy of the official record of the notice or certificate of location of the claim and a copy of either a notice of intention to hold the claim or an affidavit of performed assessment work with the proper BLM office on or before October 22, 1979. The failure to file the required documents in a timely manner resulted in a conclusive presumption of abandonment of the claim by the owner. 43 U.S.C. § 1744(c) (1988). See United States v. Locke, 471 U.S. 84 (1985); Jack T. Kelly, 113 IBLA 280, 283 (1990). Therefore, to the extent Harry C. Bosch, Sr., maintained an unpatented mining claim in lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon, his failure to record the notice or certificate of location for such a claim with BLM on or before October 22, 1979, resulted in a conclusive presumption of abandonment of that claim.

[2] Although BLM determined in its land report that Harry C. Bosch, Sr., did not file the documents necessary to preserve his mining claim in lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon, on or before October 22, 1979, the official file for mining claim ORMC 51826 contains a June 1, 1982, location notice, indicating that on May 21, 1982, Harry C. Bosch, Sr., located the "Hard Work" placer mining claim in lot 7, sec. 23. 5/ Thus, at the time BLM issued the decision on appeal (and at the time it issued the life estate residential occupancy lease to Elberta L. Bosch), the land presently occupied by appellants was part of the unpatented Hard Work placer mining claim. 6/

5/ The file also contains copies of the required notices of performance of annual assessment work. There is no evidence that BLM has taken any action to declare this claim null and void.

6/ The record establishes that any right appellants may have to occupy the land in lot 7, sec. 23, T. 40 S., R. 8 W., Willamette Meridian, Josephine County, Oregon, must be derived from the 1982 notice of mining claim location, not from the occupancy lease. That lease was a life tenancy for Elberta L. Bosch. She relinquished that lease and therefore abandoned any further right to occupy the land when she informed BLM by letter of July 10, 1989, that she had moved to Washington and did not intend to return to Oregon.

We note that the existence of the unpatented Hard Work placer mining claim would give appellants the right to use the surface of that claim to the extent the use is reasonably incident to mining activities on the

claim, if appellants can show that they are, in fact, the owners of the claim. See Bruce W. Crawford, 86 IBLA 350, 372-75, 92 I.D. 208, 220-22 (1985); 30 U.S.C. § 26 (1988). 7/ Whether or not appellants are entitled

to notice and an opportunity for a hearing on the issue of whether their occupancy is reasonably incident to mining is dependent on the facts in the case. Bruce W. Crawford, supra at 376, 92 I.D. at 222. 8/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this decision.

---

Bruce R. Harris  
Administrative Judge

I concur:

---

Gail M. Frazier  
Administrative Judge

7/ The case file for OR MC 51826 shows that for the years 1983-1989, Harry C. Bosch, Jr., filed individual proofs of labor covering both the Hard Work claim and the Dakota Boy 1 through 8 claims (ORMC 51827-34). In 1990, one Gary J. Bell submitted the proof of labor for those claims. In the proof of labor filed in September 1986, Harry C. Bosch, Jr., represented that he was the owner of the claims. However, in accordance with 43 CFR 3833.3, any person acquiring an interest in an unpatented mining claim through sale, assignment, inheritance, or otherwise is required to file in the proper BLM office within 60 days after completion of transfer certain information. There is no evidence in case file OR MC 51826 of any ownership transfer of the Hard Work claim from Harry C. Bosch, Sr. Thus, nothing in the present record indicates that either Michael Bosch or his wife is an owner of that claim.

8/ The determination of whether occupancy of a claim is reasonably incident to mining may be made without benefit of a fact-finding hearing where there is no actual mining or related activities occurring. Without the occurrence of actual mining or related activities, no right to use the surface arises. Bruce W. Crawford, supra at 376, 92 I.D. at 222. Appellants' statement of reasons in this case is directed to the fact that the claim has been the family home place for many years; no allegation is made that their occupancy is reasonably incident to mining or that they are, in fact, the owners of the mining claim located in 1982.

